



Guidance for expert witnesses giving evidence in special educational needs appeals and disability discrimination claims hearings

The overriding objective of the Tribunal Procedure Rules 2008 is to enable the tribunal to deal with appeals justly and fairly. This guidance sets out the tribunal's expectations of expert witnesses providing written and/or oral evidence in an appeal or claim.

All witnesses are expected to assist the tribunal by giving full, frank and honest evidence in a fair, impartial and independent way, regardless of whether they are employed by, or paid by, one of the parties.

The tribunal does not have strict rules of evidence, but the following key points are important and apply to all appeals or claims.

- Opinion evidence will be accorded little weight unless provided by a witness who has expertise in the relevant area.
- Experts are witnesses with particular qualifications, knowledge and/or skills, which enable them to give an opinion within their area of expertise. They do not need to be medically or scientifically qualified but must have specialist knowledge acquired by education or experience. They should avoid expressing opinions on matters beyond their expertise.
- All witnesses should assist the tribunal in accordance with the overriding objective of enabling the tribunal to deal with appeals justly and fairly.

General Principles

1. Knowledge and understanding

Expert witnesses, depending upon the circumstances, should be able to demonstrate:

- knowledge of the tribunal's process and their role in it;
- knowledge of the Code of Practice for special educational needs;
- an understanding of the issues in the case;
- compliance with all relevant professional codes of conduct and best practice; and
- up-to-date knowledge of their particular area of expertise.

2. Communication and liaison

The tribunal's case directions require experts to share information and evidence **as soon as it is available** and to identify any need for further expert evidence as quickly as possible.

Good communication and regular liaison between all parties is an essential part of an effective case. It is in the child's interests for experts to communicate openly and transparently from the outset.

The tribunal may regard failure by a party or its witness to comply with a direction without good reason, as a failure to co-operate with the tribunal which could lead to all or part of a party's case being struck out or less weight being attached to part of the evidence. It is clearly important professionals do their utmost to co-operate with each other and comply with any reasonable requests for information.

3. Evidence

The approach to information-gathering, assessment, presentation of facts, conclusions and the giving of evidence must be based on:

- ethical, sound, evidence-based standards and principles;
- instructions, where given, that are clear and unambiguous;
- precise factual and objective information that clearly identifies what is within their own knowledge and what is not, and the basis for that information;
- an accurate identification of needs that is in the child's interests and is not influenced by any pressure from a party's wishes or time constraints, and which is not resource-led;
- consideration of any previous or planned assessment relevant to their area of knowledge and practice to prevent the possibility of test score invalidation;

- advice that is justifiable and supported by evidence based on the child's needs and considers any material facts that affect that advice either way;
- the specification and quantification of any recommendations about provision unless there are clearly stated reasons for not doing so; and
- the identification of any hypothesis (as opposed to fact or opinion).

4. Letters of instruction

The tribunal is entitled to expect that any letter from a representative to an expert should:

- set out the context in which the expert's opinion is sought (including any diverse ethnic, cultural, religious or linguistic contexts);
- define carefully the specific questions the expert is required to answer;
- provide clear, focused and direct questions within the ambit of the expert's area of expertise;
- list the documentation provided;
- send any new documentation when it is filed and regular updates to the list of documents provided; and
- identify the relevant lay and professional people concerned with the appeal or claim and any other expert instructed and inform the expert of his/her right to talk to the other professionals provided an accurate record is made of the discussion.

5. Reports

Reports submitted in evidence to the tribunal must abide by any individual professional code of conduct. They should give details of the author's qualifications and experience.

Expert reports should:

- state the purpose for which they were originally written;
- set out the substance of all material instructions (whether written or oral) and facts supplied that are relevant to the conclusions and opinions expressed;
- give details of any documents, literature or other research material relied on;
- describe the assessment process and process of differential diagnosis, highlighting factual assumptions, deductions from those assumptions, and any unusual, contradictory or inconsistent features of the case;
- state whether other experts have been consulted, at what stage in the process, what information was shared and how did this inform the views expressed;

- include all relevant information whether this supports one party's case or not, including confidence in quoted test scores;
- identify, narrow and agree any issues where possible;
- make it clear if there is not enough information on which to reach a conclusion on a particular issue or point;
- identify any relevant facts not requiring an expert explanation in order to understand or interpret the observation, comprehension and description given, as well as any such facts that do require an explanation e.g. properly conducted examinations or appropriate tests;
- explain relevant technical subjects, or the meaning and application of applicable technical terms where helpful;
- indicate whether an opinion is provisional or qualified, stating the qualification and the reason for it, and identifying what further information is required to give an opinion without qualification;
- summarise opinions expressed with sound reasons for them;
- explain any delay between assessment and finalising the report;
- give a clear summary of the recommendations made; and
- be clearly dated and signed by the author.

Reports should also contain the following statements:

"I understand that my overriding duty is to assist the tribunal in matters within my expertise, and that this duty overrides any obligation to those instructing me or their clients. I confirm I have complied with that duty and will continue to do so"

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete opinions on the matters to which they refer."

6. Admissibility of evidence

Where the relationship between the expert and the party calling him or her or any placement being recommended is such that a reasonable observer might think it was capable of affecting the view of the expert so as to make them unduly favourable to that party, it is for the tribunal to decide what weight to attach to his or her evidence¹. Witnesses who are directly employed by a party or a public body are not prevented from giving evidence. If an expert witness can demonstrate independence, that is a matter which will be taken into account in considering the weight of the evidence given overall. The tribunal uses its specialist expertise in deciding issues² and evaluating all the evidence at the hearing.³ It will indicate in its decision whether it accepts the evidence of a particular witness and why it does so in preference to that of another such witness, but it is not required to give detailed reasons for so doing.⁴

The guidance contains a set of principles based on the detailed advice available in various codes of practice and guidance and is not intended to be a replacement for those. There is a list of such documents at the end of this guidance to which witnesses should refer.

Judge John Aitken
Deputy Chamber President

¹ See the case of *Factortame* at para 74: the court pointed out that the MAFF experts were civil servants, but that there could be no suggestions that their positions rendered their giving evidence contrary to public policy

² See *R (L) v London Borough of Waltham Forest and Another* [2003] EWHC2907 (Admin)

³ See *F Primary School v Mr & Mrs T and SENDIST* [2006] EWHC 1250 Admin

⁴ *R (H) v West Sussex County Council* [2006] EWHC 1275